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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 284

JOSEPH M. TROHEY, Administrator of the Estate of MARIA G. MUNA, deceased, *et al.*,

Petitioner,

vs.

TRANSOCEAN AIR LINES, INC., a corporation, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States, and to The Honorable Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 5, 1958.

Opinions Below.

Although this was a case of novel impression based upon newly created statutory rights in admiralty, the District Court wrote no opinion or memorandum of decision. The opinion and judgment of the United States Court of Appeals is printed in Appendix A hereto; the opinion is not yet reported.

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 5, 1958. Rehearing was denied on July 14, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. A., Sec. 1254(1).

Questions Presented.

The principal questions involved herein are the following:

1. Does the doctrine of *res ipsa loquitur* apply against an air carrier of passengers and a maintenance firm, or either, sued in admiralty for damages for the wrongful death of a fare-paying passenger in an unexplained crash of an airplane on the high seas?

2. If the doctrine of *res ipsa loquitur* applies against an air carrier of passengers sued in admiralty for damages for the wrongful death of a fare-paying passenger in an unexplained crash of an airplane on the high seas, does it require such carrier to adduce some evidence to rebut the inference of the carrier's negligence arising from such unexplained crash of the plane?

3. Is it reversible error for the trial court to refuse a timely requested conclusion of law upon a material litigated issue of law?

We believe that the answers to all three of these questions should be "Yes". We believe that the effect of the decisions below was to answer them "No".

Statute Involved

This action was brought under 46 U. S. C. A., Secs. 761-767, popularly known as "Death on the High Seas Act." Section 761 of 46 U. S. C. A. provides:

> "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued."

Respondents do not contend that the Act does not apply to air carriers; but they did contend in the trial court that the doctrine of *res ipsa loquitur* does not apply to cases brought under said Act, because such cases are in admiralty. The District Court accepted that view. However, during the course of appeal, respondents all but abandoned it in favor of their current position that the doctrine of *res ipsa loquitur* when applied in admiralty gives rise merely to a permissible inference of negligence which the trial court may but need not draw. The Court of Appeals appears to have sustained this position without recognizing that the District Court never accorded to itself the right to draw a permissible inference, and without distinguishing common carrier-passenger cases which endow the doctrine with more effect than a mere permissible inference from all other types of *res ipsa* cases which under Federal practice do not.

Summary Statement.

This is an action for damages for the wrongful death of three fare-paying passengers killed in the crash of a DC-6 Aircraft, N 90806. Respondent Transocean Air Lines, Inc. (hereinafter, sometimes Respondent Transocean) owned and operated the aircraft; Respondent Slick Airways, Inc., maintained the aircraft; and Douglas Aircraft Company, Inc., originally a defendant but not pursued here, manufactured it.

The crash of the aircraft occurred in the Pacific Ocean approximately 340 miles east of Wake Island.[1] The District Court had jurisdiction under the provisions of the Death on the High Seas Act, 46 U. S. C. A., Secs. 761-767. Although filed on the law side, the action was by the Court transferred to the admiralty side of the docket and was thereafter tried in admiralty before the Honorable Thurmond Clarke, District Judge, sitting without a jury.

Both in the pre-trial proceedings and at the outset of the trial, petitioner (plaintiff below) contended that the doctrine of *res ipsa loquitur* was applicable as against the air carrier and the maintenance company. [V. 1, R. 35, 37.][2] The trial court ruled that *res ipsa loquitur* did not

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[1]Inadvertently, the Court of Appeals stated the time and place of crash as 15 minutes after takeoff and 100 miles east of Wake Island (Opinion, p. 3). The difference is important as it underscores the absence of evidence of the manner of operation by the pilots at and immediately prior to the crash. The burden of going forward with such evidence was upon the common carrier, Respondent Transocean.

[2]References to the Record in the Court of Appeals are designated "R. ....". The Record herein comprises 9 volumes. Volume 1 contains the Clerk's Transcript, and Volumes 2 to 5 contain the Reporter's Transcript of trial proceedings. Since both Volumes 1 and 2 commence numbering with Page 1, references to pages in Volume 1 will expressly indicate that volume by "V. 1".

apply in admiralty [R. 90], and required petitioner to put in evidence of specific acts to show, or that would tend to show, negligence on the part of respondents. On their part, respondents offered no evidence whatever to explain the cause of the fatal crash or show proper care in all respects required of them. Nevertheless, the Court gave judgment for respondents, from which petitioner appealed. [V. 1, R. 51, 57.]

The pertinent facts are these: On July 12, 1953, at 0004 (all times noted in Greenwich Civil Time and on 24-hour clock), the aircraft involved departed from Guam eastbound for Oakland, California, as Flight 512, carrying 49 passengers and a crew of 8. [R. 53.] Intended en route stops were Wake Island and Honolulu. [R. 53.] The aircraft landed at Wake Island at 0539, refueled, and departed at 0658. Fifty passengers were then aboard, including petitioner's intestates Maria G. Muna, Francisco G. Muna, and Catalina Manalisay Guiterrez. [R. 54.] The persons named were passengers for hire who had boarded the aircraft at Guam. [R. 54.]

At 0729 the aircraft radioed a position 100 miles east of Wake Island, and that it had reached its assigned cruising altitude of 15,000 feet two minutes earlier. [R. 57.] At 0828 the aircraft radioed that it was cruising at 15,000 feet between cloud layers. [R. 58.] The radio message included no report of or reference to air turbulence or weather phenomena, and no indication of any difficulties. [R. 58.] This was the last radio contact with the flight. [R. 58.]. Approximately 12 minutes there-

after the plane crashed into the Pacific Ocean, killing all of its 58 occupants. [R. 59.] A search for the aircraft resulted in the recovery of some wreckage of the plane and 14 floating bodies. [R. 185.]

Douglas Aircraft Company manufactured the plane in question in 1949 [R. 42] and sold it to Slick Airways in April, 1951. [R. 42-43.] Slick operated it as a cargo plane until June, 1952, when it installed a passenger interior, and sold the plane to Respondent Transocean. [R. 43-44.] At all times thereafter Transocean operated the aircraft in flights between all or some of the following points: Burbank, Oakland (both in California), Honolulu, Wake Island, Guam, and Tokyo. [R. 44.] In such operations, Transocean acted as a common carrier [R. 44] under its authority from the Civil Aeronautics Board as a large irregular (nonscheduled) air carrier. [R. 356-357.] During this period Slick performed maintenance work on the plane from time to time, at Burbank, California, under a written contract with Transocean at stipulated rates [R. 45, Pltf. Ex. 6] to keep the plane in airworthy condition.

Petitioner is the administrator of the estates of Maria G. Muna, her son Francisco G. Muna, and Catalina Manalisay Guiterrez [R. 345] and sued as such for the benefit of the estates of said persons.

The Court of Appeals appears to have been in some doubt as to whether the District Court refused to apply the doctrine of *res ipsa loquitur* in this case. We believe

the record speaks for itself on this.[3] At the outset of trial, petitioner requested a ruling on whether or not *res ipsa* applied. The District Court made a ruling, referred to it as a ruling, and all opposing counsel acquiesced in it as a ruling. The Court concluded his statements upon the subject with "I didn't ask to hear from defense counsel because I thought you wouldn't quarrel with the Court's *ruling*." (Italics added.) When appellant's counsel asked whether the subject was "still open for consideration at a later date," the trial judge did say yes, undoubtedly as a concession. *At best, this can be construed as no more than saying his ruling was "without prejudice."* However, it would have taken a new and different ruling to eliminate the effect of the first one. This record is barren of such.

In addition, petitioner timely objected to the omission from the conclusions of law of any mention of applicability, or nonapplicability, of the doctrine of *res ipsa loquitur*, although the issue was raised in the pre-trial proceedings and at the outset of the trial.

Other facts adduced in evidence by petitioner-plaintiff show, or tend strongly to show, that there must have been some mechanical failure of the aircraft, or a failure of the operating personnel to exercise proper control thereof, that resulted in the crash of the plane. These facts are:

1. In the report radioed from the plane a few minutes before the crash no mention was made of weather turbu-

[3]As set forth at length in Appendix B.

lence or other phenomena. Moreover, within a very short time after the crash, another plane reported from or near the crash area favorable weather conditions. [R. 58.]

2. There was no fire, or explosive action, in the plane, because the 14 recovered bodies showed no signs of burns. [R. 184.]

3. The weather was not unusual or rough, because all of the recovered bodies, except three, showed no seat-belt lacerations on the victims. [R. 186.]

4. The plane nose-dived almost vertically into the ocean, because the fractures found in the bodies recovered could be referable only to a vertical fall of the plane. [R. 189.]

The facts and conclusions stated in paragraphs numbered 2, 3 and 4, *supra*, are those of Michael Gerundo, M.D., Medical Examiner of Guam, who performed autopsies upon some of the 14 bodies recovered from the sea after the crash. [R. 181, 183.] Dr. Gerundo is an experienced pathologist [R. 181] and his conclusions, based upon medical evidence, furnish the only reliable uncontradicted indication concerning factors that did or did not exist aboard the plane when it crashed. [R. 189.]

Petitioner also introduced other evidence showing:

1. *Faulty maintenance of the auto-pilot*, or instrument system used for flight control at cruising altitudes in long water-flights. The pilots of the plane had previously made numerous complaints or "squawks" about the tendency of the plane to lose altitude when flying under

auto-pilot control—one such "squawk" being only a short time before the last flight of the plane from Oakland to Guam.

2. *Inadequate pilot training*; including failure of both pilot and co-pilot to take important and required training in emergency procedures.

3. *Scheduling pilots for excessive hours of duty*, thereby inducing fatigue. At the time of the crash the pilots had been on duty 28 hours out of the last 42 hours. A qualified professor of physiology at U. C. L. A. with a specialty in aviation medicine testified that in his opinion the pilots were in a state of fatigue at the time of crash. This testimony was uncontradicted.

4. *Lack of test flights* after the doing of repair or maintenance work on the plane, especially after repairs on a vital auto-pilot amplifier. A malfunction of the gyro in this unit would have caused the violent reaction and down-pull to the aircraft noted in the log on May 28, 1953, yet the gyro was not checked and the amplifier itself actually was operated in excess of its prescribed operating limits of time.

Respondents offered no evidence at all concerning the cause of the crash. Their evidence was purely negative to petitioner's evidence and as to certain aspects thereof only.

REASONS FOR GRANTING THE WRIT.

I.

The Court of Appeals Decided an Important Question of Law in a Way That Conflicts With Established Law.

A. Scope and Basis of Court of Appeals' Decision.

The Court of Appeals said: "We are unable to determine from the record whether or not the trial judge applied the doctrine (of *res ipsa loquitur*) in this case. He originally felt that it did not apply; he required appellants to produce evidence as to defendant's alleged negligence * * *." The Court of Appeals later said: "* * * if *res ipsa loquitur* should have been applied by the trier of fact, and was not, the application of that doctrine alone to the facts of this case is not sufficient to require a judgment as a matter of law for plaintiffs." Yet in so reasoning the Court of Appeals denied petitioner's passengers the benefit of even a permissible inference from *res ipsa*. For with the trial court's refusal to apply the doctrine, nothing else could supply (1) an inference of negligent conduct by the carrier on the occasion in question, and (2) an inference of proximate cause. Thus, in the trial court's final view, the scales remained evenly balanced, and we failed to carry our burden of proof. It was to fill just such a gap that the doctrine of *res ipsa loquitur* was intended. As approved by the same Court of Appeals (Opinion, p. 7) in *Des Marias v. Beckman*, 198 F. 2d 550:

> ". . . the function of the doctrine, as stated in the introduction to Shain's Res Ipsa Loquitur, is to supply a fact, i.e., defendant's negligence, which must have existed in the causal chain stretching from the act or omission by the defendant to the injury

suffered by the plaintiff, but which the plaintiff because of circumstances surrounding the causal chain, cannot know and cannot prove to have actually existed."

To say (Opinion, p. 4) that with or without *res ipsa* we do not show a *clear* preponderance of evidence in the Court of Appeals wholly fails, we submit, to give us the benefit of the rule in the trial court where all we are required to show is a *mere* preponderance of evidence. Especially is this true where as here the evidence is all circumstantial to the cause of crash.

The Court of Appeals asked itself the question, "Does *res ipsa loquitur* apply in admiralty cases?" It then proceeded to decide the case on the basis of the decisions of this Court in *Sweeney v. Erving*, 228 U. S. 233; *Jesionowski v. Boston & Maine R.R.*, 329 U. S. 452; and *Johnson v. United States*, 333 U. S. 46. None of these cases is a passenger-carrier case. The *Sweeney* case was against a physician for damages for injuries sustained in making X-ray tests. The *Jesionowski* case was for damages for the death of a railroad employee (a switchman) caused by the derailment of a car upon which decedent was riding, allegedly caused by a defect in said car or the track, or roadbed of the defendant Railroad. The *Johnson* case was for damages for personal injuries sustained by a seaman caused by a block falling upon plaintiff's head, which block was being handled by another seaman. These three cases do not state the true rule applicable in a passenger-common carrier case, although

there are numerous expressions of opinion therein that are helpful in our case. For example, in the *Johnson* case it is said: "No act need be explicable only in terms of negligence in order for the rule of *res ipsa loquitur* to be invoked. The rule deals only with permissible inferences from unexplained events. * * * The inquiry, however, is not as to possible causes of the accident but whether a showing that petitioner was without fault and was injured by the dropping of the block is the basis of a fair inference that the man who dropped the block was negligent. We think it is, for human experience tells us that careful men do not customarily do such an act." (*Id.*, 333 U. S. at pp. 49-50.) In the dissenting opinion in that case, Mr. Justice Frankfurter said: "If (*res ipsa loquitur*) is, after all, a 'rule of necessity to be invoked only when necessary evidence is absent and not readily available.' (See, Cooley, Torts, 4th Ed., sec. 480.)" (333 U. S. 53.)

In the case at bar there was no survivor among crew members and passengers. The accident was not explained, and perhaps cannot be explained. Indeed, Respondent Transocean and Respondent Slick stipulated at the pretrial conference that they "are not aware of any facts which reasonably could have caused this accident and intend to offer no evidence tending to show such cause." [V. 1, R. 30-37.] Nor did Respondents offer any evidence to show or to explain the cause of the accident. Under such circumstances we submit that the inference of negligence required a judgment in favor of the petitioner of a matter of law where, as here, a passenger-carrier case exists and the inference is not rebutted by any evidence at all.

B. The Decision of the Court of Appeals for the Ninth Circuit Conflicts With Other Decisions of Said Court.

The case of *Des Marias, et al. v. Beckman*, 198 F. 2d 550, involved almost identical facts to those involved in the case at bar. The airplane upon which plaintiff's decedent was a passenger in that case disappeared without a trace during flight although no icing or storm conditions prevailed along its route. It was flying from Alaska to the United States. The Court of Appeals affirmed the judgment of the District Court of Alaska in a *Per Curiam* Opinion. Reference to the opinion of the District Court, 100 Fed. Supp. 1, shows that judgment was for the plaintiff. It was contended that *res ipsa loquitur* applied and the Court so held, saying, at page 2:

> "The question presented, therefore, is whether the doctrine of res ipsa loquitur applies where the plane disappears during flight without a trace. The defendant's contention that the doctrine is not applicable to a case such as this is based primarily on the ground that since the plane disappeared without a trace, the defendant can have no knowledge of the cause of the loss of the plane superior to that possessed by the plaintiffs. * * * Since inability, because of lack of knowledge, to show specific acts of negligence is a prerequisite to the application of the doctrine itself, it follows that equality of knowledge precludes its application. But from this it does not follow that conversely equality of ignorance will likewise preclude applicability, for the function of the doctrine, as stated in the introduction to Shain's Res Ipsa Loquitur, is to supply a fact, i.e. defendant's negligence, which must have existed in the causal chain stretching from the act or omission by the defendant to the injury suffered by the plaintiff.

but which the plaintiff because of circumstances surrounding the causal chain, cannot know and cannot prove to have actually existed. I conclude, therefore, that the rule barring the application of the doctrine where there is equality of knowledge is not applicable to the case at bar. * * *

"I am of the opinion that the doctrine of res ipsa loquitur is applicable and that the motion to dismiss should be denied. Seaman v. Curtiss Flying Service, 231 App. Div. 867; 247 N. Y. S. 251; Smith v. Pacific Alaska Airways, 9 Cir., 89 F. 2d 253; Pacific Alaska Airways v. Mahan, 9 Cir., 89 F. 2d 255. Judgment may accordingly be entered for the plaintiffs."

The decision also conflicts with the decisions of said court in *Smith v. Pacific Alaska Airways*, 89 F. 2d 253; *Pacific Alaska Airways v. Mahan*, 89 F. 2d 255; and *Bergen v. United States*, 222 F. 2d 949. In the *Bergen* case, plaintiff was a passenger of the Alaska Railroad, a Government instrumentality, at the time the car in which he was riding derailed and turned over. The District Court gave judgment for defendant on the ground that there was no showing of negligence. Held, *reversed*. The Court states (p. 950):

"The cause of the wreck we do not know. * * * However, we believe that this was clearly a case of an instrumentality and events solely within the control of the defendant and a case for the application of *res ipsa loquitur*. The burden of going forward on negligence was upon defendant, and the plaintiff's abortive attempt to prove the cause of the wreck, we hold, did not remove this burden."

C. The Decision of the Court of Appeals Is in Conflict With the Decisions of This Court.

It has been settled law since *Stokes v. Saltonstall* (1839), 13 Pet. 181, 10 L. Ed. 115, that upon the happening of an injurious accident in passenger cases that fact alone is *prima facie* evidence of negligence on the part of the carrier, and that where the passenger is without fault, the burden rests upon the carrier to show that it fully performed its whole duty and that the accident was unavoidable.

Stokes v. Saltonstall (1839), 13 Pet. 181, 10 L. Ed. 115;

N. J. R.R. Company v. Pollard, 22 Wall. 341, 22 L. Ed. 877;

Pennsylvania Company v. Roy (1880), 102 U. S. 451, 455-456;

Gleeson v. Virginia Midland Ry. Co., 140 U. S. 435.

The *Stokes* case, *supra*, was for injuries sustained by a passenger caused by the upsetting of a stagecoach. The Court held the carrier liable on the mere showing, without explanation by the carrier, of the upsetting of the coach.

In *Gleeson v. Virginia Midland Ry. Co.*, 140 U. S. 435, the Court stated the rule here applicable in the following language:

> "Since the decisions in *Stokes v. Saltonstall*, 13 Pet. 181, and *Railroad Company v. Pollard*, 22 Wall. 341, it has been settled law in this court that the happening of an injurious accident is in passenger

> cases *prima facie* evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care), the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. The rule announced in those cases has received general acceptance; and was followed at the present term in *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551."

The other cases cited, *supra*, all hold to the same effect.

That the federal rule of *res ipsa* in carrier cases is *not* merely a permissible inference was recognized in an annotation, "*'Res Ipsa loquitur' as a presumption or a mere permissible inference*," 53 A. L. R. 1509, where it is said:

> "Even in the United States Supreme Court (although this court is generally credited with having adopted the theory that the doctrine of 'res ipsa loquitur' is a mere permissible inference), the rule is that the happening of an injurious accident, in passenger cases, prima facie, is evidence of negligence on the part of the carrier, and, the passenger being himself in the exercise of due care, the burden then rests upon the carrier to show that his whole duty was performed and that the injury was unavoidable by human foresight."

The rule is stated in substantially the same language in 65 C. J. S. 996, Sec. 220(3)b.

D. The More Recent Decisions of This Court, Cited in the Opinion Below, Are Not in Conflict With the Rule Stated in C, Supra.

The Court of Appeals relied strongly on *Sweeney v. Erving*, 228 U. S. 233, in holding in the instant case that the unexplained crash of a passenger plane on the ocean merely warrants an inference of negligence, but does not compel it. From this, the Court states the burden of proof remains with plaintiff, and, apparently, plaintiff must adduce other evidence of negligence. The lower court failed to note that in the *Sweeney* case, the rule here invoked was given full recognition in the following language (33 S. Ct. 417-418):

> "The general rule in actions of negligence is that the mere proof of an 'accident' (using the word in the loose and popular sense) does not raise any presumption of negligence; but in the application of this rule, it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, *res ipsa loquitur*,—the thing speaks for itself; that is to say, *if there is nothing to explain or rebut the inference that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence.*" (Emphasis added.)

In the case at bar the respondents made no effort "to explain or rebut the inference that" arose from the crash of the plane at sea; therefore, the crash "may fairly be inferred to have been occasioned by negligence."

In *Johnson v. United States*, 333 U. S. 46 (which involved injury to a seaman), this Court had no difficulty in applying the rule of *res ipsa loquitur* where the dropping of a block upon plaintiff, being handled by a fellow servant, was unexplained. This Court, by Mr. Justice Douglas, said (*Id.*, pp. 49-50):

> "No act need be explicable only in terms of negligence in order for the rule of res ipsa loquitur to be invoked. The rule deals only with permissible inferences from unexplained events. In this case the District Court found negligence from Dudder's act of dropping the block since all that petitioner was doing at the time was coiling the rope. The Circuit Court of Appeals reversed, 160 F. 2d 789, feeling that petitioner might have pulled the block out of Dudder's hands. It reasoned that although petitioner testified he was bending over coiling the rope when the block hit him, the concussion may have caused a lapse of memory which antedated the actual injury. The inquiry, however, is not as to possible causes of the accident but whether a showing that petitioner was without fault and was injured by the dropping of the block is the basis of a fair inference that the man who dropped the block was negligent. We think it is, for human experience tells us that careful men do not customarily do such an act."

In *Jesionowski v. Boston & Maine R. R.*, 329 U. S. 452, this Court quoted and approved the rule of *res ipsa loquitur* as stated in *San Juan Light & Transit Co. v. Requena*, 224 U. S. 89, as follows:

> "When a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such, as in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care."

The Court thus held that the unexplained happening of an injury not only creates an inference of negligence on the part of a defendant, but that "it affords reasonable evidence, in the absence of an explanation, that the injury arose from defendant's want of care." It may be noted that *res ipsa loquitur* was applied in the *Jesionowski* case notwithstanding the fact that there was evidence that the instrumentality causing the accident was not wholly under the control of defendant.

II.

The Court of Appeals Erred in Holding, as a Matter of Law, That the Inference of Negligence Arising From the Unexplained Crash of the Plane at Sea Was, by Itself, Insufficient to Support a Judgment for the Petitioner.

The Court of Appeals paid only lip service to the doctrine of *res ispa loquitur*. This, we believe, is made clear by many statements in the Court's opinion, including the following:

> "We cannot say as a matter of law that had the rule (*res ipsa loquitur*) been relevant and applicable here it could by itself require or sustain a verdict for plaintiff.
>
> "The facts of an unexplained crash into the ocean may warrant an inference of negligence, but do not compel that inference."

The Court thus said, in effect, that even if the doctrine did apply to the instant case, the trial court could disregard it in arriving at its judgment.

In this case the *inference* of negligence arising out of the unexplained crash of the plane was not rebutted, since Respondent Transocean offered no evidence tending to show the cause of the accident or that it acted with utmost prudence on the occasion in question.

In *Patton v. Texas & P. R.R. Co.* 179 U. S. 658, it was said that

> "* * * in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of a carrier, a presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is prima facie a breach of his contract to carry safely (citing cases) * * *."

The cases cited by the Court are *Stokes v. Saltonstall*, 10 L. Ed. 1115; *New Jersey R & T Co. v. Pollard*, 22 L. Ed. 877; *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, all of which have been cited and discussed herein, *ante*.

It is obvious that in the instant case the Court of Appeals relied upon the narrow, out-of-context, phrase found in *Sweeney v. Erving*, 228 U. S. 233, 240, that "the facts of the occurrence warrant the inference of negligence, not that they compel such an inference." As already noted, the *Sweeney* case was against a physician for damages for injuries sustained in making X-ray tests, and did not involve a carrier-passenger relationship. The Court's use of the word "inference" in the *Sweeney* case has been construed in numerous cases as *not* meaning "presumption," but the words are synonymous. (Webster's Int. Dict. 2d Ed.; Bouvier's Law Dict. 3d Rev.) In any event, however, the statement in the *Sweeney* case that an unexplained injurious accident does not compel the inference of negligence cannot justify the ruling by the trial judge that the doctrine of *res ipsa loquitur* does not apply in the case at bar. Moreover, the *Sweeney* case itself states that "if there is nothing to explain or rebut the inference that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence." And, as also stated, *ante*, this Court and other federal courts in later cases have found no difficulty in applying the doctrine where an unexplained accident is involved and the plaintiff is without fault. And, this is especially true in carrier-passenger cases. (*Bergen v. United States*, 222 F. 2d 949; *Austerberg v. United States*, 169 F. 2d 583, 591; *Matsumoto v. Chicago & N. W. Ry. Co.*, 168 F. 2d 496; *Des Marias v. Beckman*, 198 F. 2d 550, aff. *Haasman v. Pacific Alaska Air Express*, 100 Fed. Supp. 1.)

III.

The Court of Appeals Erred in Holding That It Could Not Reverse the Judgment Below Because the Trial Judge Had Found That the Preponderance of the Evidence Favored the Defendants.

There is no factual basis in the evidence for the Court of Appeals statement (Opinion, p. 12) that the trial court "found the preponderance [of the evidence] favored the defendants." Again we state that the defendants did not offer any evidence at all to explain the crash of the plane, or to show the use of utmost care, which the law requires of a common carrier, in all respects which could have caused it. Indeed, they stipulated in the Pre-Trial Order that they "are not aware of any facts which reasonably could have caused this accident and intend to offer no evidence tending to show such cause." [V. 1, R. 36-37.]

Petitioner, after being required by the trial court to submit evidence tending to show negligent acts or omissions by defendants that might have caused the crash, offered evidence among other items to show faulty maintenance of the auto-pilot, inadequate pilot training, scheduling of pilots for excessive hours of duty, and lack of test flights after repairs on the plane.

Respondents offered rebuttal evidence as to some of these items, but such rebuttal evidence was of a purely negative character. Most important, Respondent Transocean did not and could not offer evidence tending to explain the cause of the accident, nor establish due care *in all*

possible respects which could have caused it.[4] Transocean admitted that it did not know the cause. [R. 859.] Likewise, it did not know and could offer no evidence that it "acted on the occasion with reasonable skill, and with utmost prudence and caution" (to quote from *Stokes v. Saltonstall*). *There was no evidence of how its pilots acted at and immediately prior to the time of crash.* This lack we believe is fatal to the judgment in its favor. It was just such a lack which led Judge Folta, and the Court of Appeals for the Ninth Circuit in affirming, to give judgment for plaintiff in *Des Marias v. Beckman*, 198 F. 2d 550.

The Court of Appeals was not bound by the District Court's finding that the preponderance of the evidence favored respondents (1) because the finding stemmed from the error of law committed by the trial court in holding at the outset of the trial that the rule of *res ipsa loquitur* did not apply, and (2) because there was no evidence at all to explain the crash of the plane.

The "clearly erroneous" rule (Federal Rules of Civil Procedure, Rule 52(a)) does not preclude review of a finding which stems from an error of law, and the District Court committed an error of law in ruling that the doctrine of *res ipsa loquitur* did not apply to the unexplained crash of the plane.

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[4] Although the Court's opinion (p. 2) states: "Defendants offered evidence to show what they knew of the aircraft's maintenance and operation", none of the evidence referred to pertained to the aircraft's operation at and immediately prior to time of crash.

In *Owen v. Com'l Union Fire Ins. Co. of N. Y.*, 211 F. 2d 488 (C. A. 4, 1954), the Court states (p. 489):

> "* * * The rule that an appellate court will not disturb findings of fact made by the trial judge unless they are clearly erroneous does not apply if he has committed an error of law which has manifestly influenced or controlled his findings of fact, such as a mistake as to the burden of proof. 3 Am. Jur. p. 472; Hall. v. Hall, 41 S. C. 163, 19 S. E. 305, 44 Am. St. Rep. 696; Chase v. Woodruff, 133 Wis. 555, 113 N. W. 973, 126 Am. St. Rep. 972."

The trial court erred in ruling that *res ipsa loquitur* did not apply, and the Court of Appeals erred in holding that it was bound by the trial court's finding which was based on an error of law. There could be no finding based upon evidence exonerating Respondent Transocean in respect to the manner of its operation of the aircraft after its take-off from Wake Island and immediately before the crash, for no evidence was introduced thereon. This record is silent as to what caused the emergency, or how the pilots acted during and immediately before those last awful minutes.

IV.

The District Court Erred in Refusing Petitioner's Timely Request, Before the End of the Trial, to Make a Conclusion of Law as to Whether or Not the Doctrine of Res Ipsa Loquitur Applied Here.

It is obvious that the question whether *res ispa loquitur* applied to the facts of this case was material, indeed vital, to the successful prosecution thereof. We have already set forth the ruling of the trial court that the doctrine was not applicable. (See Appendix B hereto.) In petitioner's objections to the findings of fact and conclusions of law proposed by Respondent Transocean, petitioner requested the Court to make a conclusion of law that the doctrine did, or did not, apply in this case. The Court ignored the request, refused to make the conclusion requested, and signed the conclusions as originally submitted by respondents.

The effect of the trial court's refusal to make the conclusion requested is reflected in the ambiguous language of the Court of Appeals adverted to under Point I. A. and Point II. The effect of the trial court's refusal to give petitioner the benefit of the requested conclusion of law was injurious and prejudicial. Moreover, such refusal is contrary to Rule 52(a) of Federal Rules of Civil Procedure, and violates the basic purpose of said rule, that is, to aid appellate courts by giving them a clear understanding of the basis of the trial court's decision. (See, *Gamewell Co. v. City of Phoenix*, 216 F. 2d 928; *Skelly Oil v. Holloway*, 171 F. 2d 670; *Goodacre v.*

Panagopoulos, 110 F. 2d 716; *Tulsa City Lines v. Mains*, 107 F. 2d 377.)

It has been held that where, as here, the trial court refuses to make a finding or conclusion upon a material question litigated at the trial, such refusal constitutes reversible error. (See *Century Indemnity Co. v. Nelson*, 303 U. S. 213, 58 S. Ct. 531.)

For the reasons hereinabove stated, petitioner respectfully prays that the writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit in order that the erroneous judgment of said Court may be reviewed by this Honorable Court.

Respectfully submitted,

A. J. BLACKMAN,

Attorney for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

Joseph M. Trihey, Administrator of the Estate of Maria G. Muna, deceased, *et al.*, Appellant, vs. Transocean Air Lines, Inc., a corporation, *et al.*, Appellees. No. 15,446.

May 5, 1958.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Fee, Chambers and Barnes, Circuit Judges.

Barnes, Circuit Judge:

This is an appeal from a decision of the District Court for the Central District of California in an action in admiralty for the wrongful death of three passengers lost in the crash of an airplane operated by Transocean Air Lines, Inc., a corporation (hereinafter, Transocean), over the Pacific Ocean on July 12, 1953. It arises under the Death on the High Seas Act, 46 U. S. C. §§761-768 (hereinafter, D. H. S. A.). Exclusive jurisdiction is conferred on the admiralty court. 28 U. S. C. §761; Higa v. Transocean Airlines, 9 Cir., 1955, 230 F. 2d 780. The action is against the carrier, Transocean; the maintenance contractor, Slick Airways, Inc., a corporation (hereinafter, Slick); and the manufacturer of the aircraft, Douglas Aircraft Corporation, Inc., a corporation (hereinafter, Douglas).

Plaintiff is the qualified administrator of the estates of Maria G. Muna, deceased; Francisco G. Muna, deceased; and Catalina Manalisay Guiterréz, deceased, and represented their heirs in filing this suit based on negligence. He invoked the doctrine of res ipsa loquitur. The trial judge indicated doubt if the doctrine applied and required plaintiff to present his case in full, *i.e.*, to present all evidence of specific acts of negligence known to him. At the close of

the case, by way of motion for inclusion of a statement of decision and by objections to the findings of fact and conclusions of law, plaintiff sought to obtain a clear ruling or statement from the court, stating whether the court had applied or considered applicable the doctrine of res ipsa loquitur. These several motions were denied and no clear ruling on the point was ever made.

In this case appellant strongly urges (though not exclusively) that the applicability of the doctrine of res ipsa loquitur would cure *all* the defects seen by the trial court in his case. We cannot agree, for under the doctrine of res ipsa loquitur, as expounded by the Supreme Court of the United States, and applicable in admiralty proceedings, while the doctrine of res ipsa loquitur *permits* a verdict for one in appellant's position, its application does not *require* it.

Appellant urges that because respondents offered no evidence to explain the cause of the aircraft plunging into the sea, they are liable. Appellant himself offered no evidence to explain the cause of the crash. He offered evidence to show what *might* have caused it. Defendants offered evidence to show what they knew of the aircraft's maintenance and operation. (Witnesses Carson, Buckalew, Wood, Captain Keating, and Exhibits A to M, inclusive.) The matter then rested with the trial court's conclusion as to where the preponderance of evidence lay. Findings of fact adverse to appellant, supported by conflicting evidence, were filed, as well as appropriate conclusions of law favoring all defendants. We are asked to reverse, as a matter of law.

Plaintiff's points on appeal are these:

1. Res ipsa loquitur should have been applied by the trier of fact.

2. If res ipsa loquitur was applied, it was sufficient as a matter of law for plaintiff to have judgment.

3. Even without res ipsa loquitur the clear preponderance of the evidence requires a judgment for plaintiff.

4. Errors in findings.

5. Error in failure to award plaintiffs value of baggage lost and fares paid by decedents.

Most of the "facts" are uncontradicted, but there is a substantial conflict as to their interpretation on the issue of negligence.

The plane involved was on a flight from Guam to Oakland via Wake Island and Hawaii. It crashed without radio warning of trouble approximately one hundred miles east of Wake Island about fifteen minutes after take-off. Bits of the plane and fourteen unidentified bodies were recovered from the ocean.

Plaintiff introduced much evidence of alleged deviations from Civil Air Regulations, the manuals of the carrier, and approved maintenance procedures; evidence of maximum use of the plane by the carrier from purchase of the time of the crash; alleged fatigued condition of the crew (out of forty-two hours from take-off the crew spent twenty-eight hours on duty, twenty-two hours aloft, and thirteen hours off duty—at Guam); evidence of allegedly faulty maintenance of the automatic pilot (—plaintiff strongly implies this was the cause of the crash—) and of No. 4 engine; and alleged poor qualifications of one of the co-pilots.

Slick was the original owner of the plane, but had sold it to Transocean in 1952. Slick was the maintenance contractor for the aircraft and had done its last maintenance work approximately three weeks before the crash. There was evidence of Slick's allegedly faulty maintenance and testing of the plane in various particulars.

As to Douglas there was no evidence introduced.

Applicability of Res Ipsa Loquitur.

We agree that res ipsa loquitur is applicable to certain aircraft crash cases. We are unable to determine from the record whether or not the trial judge applied the doctrine in this case. He originally felt it did not apply; he required the appellants to produce their evidence as to defendant's alleged negligence; he stated the applicability of the doctrine was "still open for consideration at a later date"; he permitted counsel to argue its applicability on final argument and to cite cases at final argument in support of its applicability. The court then gave judgment for defendants without disclosing whether or not he considered res ipsa loquitur applicable.

But whether or not the court applied the doctrine is not controlling on this appeal. This because, were it applied, the trial court was yet required to weigh all the evidence produced. This the court did and made findings adverse to appellants in respect to each defendant's negligence (Findings XXXIII, XXXIV, XXXV); in respect to the airworthiness of the plane and in respect to its maintenance (Findings XXXVI, XXXVII); in respect to the certification of the plane, and the fatigue of the crew (Findings XXIII, XXV, XXVI).

In other words, even if res ipsa loquitur should have been applied by the trier of fact, and was not, the application of that doctrine alone to the facts of this case is not sufficient to require a judgment as a matter of law for plaintiffs. And we cannot agree that either with or without res ipsa loquitur we are required to rule that the clear preponderance of the evidence, as a matter of law, requires a judgment for plaintiffs. The rule followed at one time that trial *de novo* exists in admiralty appeals is no longer the law. McAllister v. United States, 1954, 348 U. S. 19; Western Canada Steamship Co. v. United States, 9 Cir., 1957, 245 F. 2d 921, n. 2.

We have seen that an action under the "Death on the High Seas" Act is exclusively triable on the admiralty side of the court. Higa v. Transocean Airlines, *supra*.

Does res ipsa loquitur apply in admiralty cases? The Supreme Court has at least impliedly so ruled in a case in admiralty where res ipsa loquitur was expressly applied without discussion of its possible inapplicability. Johnson v. United States, 1949, 333 U. S. 46, reversing 160 F. 2d 789. In that case, the Supreme Court granted certiorari and reversed this Court "because of the seeming misapplication by the court below of Jesionowski v. Boston & Maine RR Co., 329 U. S. 452." *Id.* p. 47.[1]

Applying the Jesionowski rule to the facts of the instant case, we first ask, were the persons whose heirs are here suing without fault? There is no evidence one way or another. We know that passengers have become crazed or drunken and attempted to wrest control of airplanes from pilots. We know that individuals have attempted

[1]This Court referred to the Jesionowski case twice in Johnson. We first said:

"The Supreme Court in Jesionowski . . . laid down the rule that courts are not to apply a 'conceptualistic interpretation' or res ipsa loquitur, and that an examination of the facts and circumstances of a particular case should be made. The Supreme Court said: 'The question here really is . . . whether the circumstances were such as to justify a finding that this derailment was a result of defendant's negligence . . . .'

We think the circumstances of this (Johnson) case are not 'such as to justify a finding that this [accident] was a result of [appellant's] negligence.'" (p. 793.)

We later said:

"We do not think that the falling of a block during a 'rounding in' operation is an accident which is 'ordinarily the result of negligence' such as a derailment in the Jesionowski case, *supra*." (p. 794.)

Mr. Justice Douglas, in discussing Jesionowski in the Johnson case, said:

"The rule of *res ipsa loquitur* applied in Jesionowski v. Boston & Maine R. Co., *supra*, means that the facts of the occurrence

suicide from airplanes and endeavored to take all occupants with them to their death. All this is possible, but certainly not probable. Nor can we presume any such interference in this case. The presumption of the exercise of due care for one's own safety, if it applies to pilots and engineers of airplanes, should with equal or greater cogency apply to passengers. In the absence of all evidence as to conduct, we presume due care was exercised by all passengers.

We next ask, (if we assume the passengers were exercising due care for their own safety, and were therefore without fault, and died as a result of a plane disappearing without warning into the sea) whether there is the basis for a fair inference that, to paraphrase Jesionowski, "the man who dropped the plane" was negligent. If we knew that it was the *pilot* who caused the plane to dive into the sea, we think that such an inference of negligence would be a fair one. But apparently no one knows if there was pilot failure, or any human failure, connected with, or that proximately caused, the accident.

This court has applied res ipsa loquitur to a case involving the unexplained loss of an aircraft at sea. Haasman v. Pacific Alaska Air Express, D. Alaska, 1951, 100 F. Supp. 1, affirmed *sub nom.* Des Marais v. Beckman,

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warrant the inference of negligence, not that they compel such an inference.' Sweeney v. Erving, 228 U. S. 233, 240. . . . [W]here as here, the injured person is not implicated, [citing Jesionowski] the falling of the block is alone sufficient basis for an inference that the man who held the block was negligent. * * *

No act need be explicable only in terms of negligence in order for the rule of *res ipsa loquitur* to be invoked. The rule deals only with permissible inferences from unexplained events. . . . The inquiry, however, is not as to possible causes of the accident but whether a showing that petitioner was without fault and was injured by the dropping of the block is the basis for a fair inference that the man who dropped the block was negligent. We think it is, for human experience tells us that careful men do not customarily do such an act." (pp. 48, 49, 50.)

1952, 198 F. 2d 550. There this Court approved the following language:

"The question presented, therefore, is whether the doctrine of res ipsa loquitur applies where the plane disappears during flight without a trace. The defendant's contention that the doctrine is not applicable to a case such as this is based primarily on the ground that since the plane disappeared without a trace, the defendant can have no knowledge of the cause of the loss of the plane superior to that possessed by the plaintiffs.

The rule precluding the application of the doctrine where the plaintiff's knowledge is equal to that of the defendant is stated in 65 C. J. S., Negligence, §220(5), page 1000 and 38 Am. Juris. 995, Section 209. An examination of the authorities cited in support of the rule however, discloses that it is applied to cases where the plaintiff has equal knowledge or where knowledge of the cause is equally accessible to the plaintiff—not to cases in which there is an equality of ignorance as in the instant case. Since inability, because of a lack of knowledge, to show specific acts of negligence is a prerquisite to the application of the doctrine itself, it follows that equality of knowledge precludes its application. But from this it does not follow that conversely equality of ignorance will likewise preclude applicability, for the function of the doctrine, as stated in the introduction to Shain's Res Ipsa loquitur, is to supply a fact, *i.e.*, defendant's negligence, which must have existed in the causal chain stretching from the act or omission by the defendant to the injury suffered by the plaintiff, but which the plaintiff because of circumstances surrounding the causal chain, cannot know and cannot prove to have actually existed. I conclude, therefore, that the rule

barring the application of the doctrine where there is equality of knowledge is not applicable to the case at bar. *Cf.* Weller v. Worstall, 50 Ohio App. 11, 197 N. E. 410, 413.

Defendant also contends that it did not have exclusive control of the plane because of the requirements prescribed by the regulations of the Civil Aeronautics Board, in consequence of which, it is asserted, some measure of control was in the Board. This is merely confounding control of the plane with regulation by public authority. *Cf.* Parker v. James E. Granger, Inc., 4 Cal. 2d 668, 52 P. 2d 226.

I am of the opinion that the doctrine of res ipsa loquitur is applicable and that the motion to dismiss should be denied. Seaman v. Curtiss Flying Service, 231 App. Div. 867, 247 N. Y. S. 251; Smith v. Pacific Alaska Airways, 9 Cir., 89 F. 2d 253; Pacific Alaska Airways v. Mahan, 9 Cir., 89 F. 2d 255. Judgment may accordingly be entered for the plaintiffs." 100 F. Supp., at 2.

Judge Folta cited in support of the applicability of the doctrine Seaman v. Curtiss Flying Service, 1930, 247 N. Y. S. 251; Smith v. Pacific Alaska Airways, 9 Cir., 1937, 89 F. 2d 253; and Pacific Alaska Airways v. Mahan, 9 Cir., 1937, 89 F. 2d 255.

The last two cases above were apparently not filed in admiralty, inasmuch as the earlier cases did not read the D.H.S.A. as conferring exclusive jurisdiction in admiralty. (Powers v. Cunard SS. Co., S. D. N. Y., 1933, 32 F. 2d 720.) In the Smith case, where plaintiff proved the plane crashed and then rested, Judge Wilbur assumed without discussion that *res ipsa loquitur* applied, and that the applicable rule as to *res ipsa* appears in Gleeson v. Virginia Midland RR Co., 1891, 140 U. S. 435 and Sweeney v.

Erving, 1913, 228 U. S. 233, 240. In Pacific Alaska Airways v. Mahan, *supra*, no question of *res ipsa loquitur* was discussed. In Seaman v. Curtis Flying Service, *supra*, there is the bare holding that *res ipsa loquitur* applies to an unexplained aircraft crash which resulted in the death of a passenger.

Earlier cases, such as Smith v. Pennsylvania Central Airlines Corporation, D. D. C., 1948, 76 F. Supp. 940, hold *res ipsa loquitur* applicable to aircraft crashes over land, but observe that the rule "has never been applied to loss of life at sea." *Id.*, 943. We may accept Judge Holtzoff's conclusion as of 1948, but since then, as we have seen, the doctrine has been applied at least by this Court of Appeals to loss of life at sea. The doctrine having as "its first requirement . . . (the) basis of past experience"[2] is peculiarly one of growth ordered by quantitative experiences of mankind.

It would do little good to review the various aircrash cases many of which hold the doctrine applicable and many of which do not.[3]

In view of our conclusions hereinafter expressed, we need not meet the issue as to whether or not *res ipsa loquitur* is applicable to any and all aircrashes; whether applicable to aircrashes on land or in waters within territorial limits, where the doctrine is generally applicable, and not over waters outside the territorial limits of such lands; whether applicable to some aircraft crashes under the particular facts known about them and not to other aircraft crashes occurring under differing factual situations. We have heretofore held *res ipsa loquitur* applicable

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[2]Prosser "Res Ipsa Loquitur in California," 37 Calif. L. Rev. 183, 191.

[3]See Goldin, "The Doctrine of Res Ipsa Loquitur in Aviation Law," 18 So. Cal. L. Rev. 15, 124.

to suits on the admiralty side in certain cases, and we see no reason to change that rule.[4]

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[4]Johnson v. U. S., 9 Cir., 1947, 160 F. 2d 729 reversed on other grounds, 1949, 333 U. S. 46. Judge Holtzoff's analysis in Smith v. Pennsylvania Central Airlines Corp., *supra*, is worthy of note:

"The progress of aviation has been rapid. In the course of comparatively few years, it has reached a point at which a host of transport airplanes flying according to fixed schedules over a network of permanent routes, carry thousands of passengers annually. Airplane lines vigorously compete with railroads and steamships. Those responsible for the remarkable and swift growth and development of aviation can justifiably boast of a superb record of unparalleled and rapid achievement and success. Accomplishment must be accompanied by responsibility. No reason is discernible why the principles that govern the liability of other common carriers, such as railroads, should not be equally applicable to transport airplanes operating as common carriers.

The majority of reported cases have reached the conclusion that the rule of res ipsa loquitur is applicable to accidents occurring on airplanes operated as common carriers. Thus, in Smith v. O'Donnell, 215 Cal. 714, 719, 12 P. 2d 933, 935, it was stated: 'There can be no doubt, under the general law of common carriers as we have found it, that those airlines which are engaged in the passenger service on regular schedules on definite routes fall within the classification. The industry itself should be desirous of assuring the public that those who accept their invitation to travel by air will be accorded that protection which may be afforded by the exercise of "the utmost care and diligence for their safe carriage." . . . It may safely be asserted that there is no mode of transportation where the passenger's safety is so completely entrusted to the care and skill of the carrier.'

The following cases hold to the same effect: Genero v. Ewing, 176 Wash. 78, 28 P. 2d 116; Smith v. Pacific-Alaska Airway, 9 Cir., 89 F. 2d 253; Seaman v. Curtiss Flying Service, 231 N. Y. App. Div. 867, 247 N. Y. S. 251.

In England the same view has been expressed and applied. Thus in Fosbroke-Hobbes v. Airwork, Ltd., 1 All. E. R. 108 (1937); 1 Avi. 663, 664, is found the following illuminating discussion: 'It was argued that I ought not to apply this doctrine to an aeroplane, a comparatively new means of locomotion, and one necessarily exposed to the many risks which must be encountered in flying through the air, but I cannot see that this is any reason for excluding it. Large numbers of aeroplanes are daily engaged in carrying mails and passengers all over the world, and, as is well known, they arrive and depart with the regularity of express trains. They have indeed become a common-place method of travel, supplementing, though not superseding, rail and sea transport. Railways were just as great an innovation when they took the place of the stage coach, yet

But as much difficulty is caused by the various definitions of what the rule is and what it does, as by the question as to whether is should or can be used.

Around the casual words of Baron Pollock during legal argument there has evolved a legal doctrine that has been severely criticized.[5]

Mr. Justice Groner of the United States Court of Appeals for the District of Columbia has given a quick summary of the problem (described by others as a lucid

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the courts found no difficulty in applying to them by the year 1844 the same doctrine that had formerly been applied to stage coaches."

The same result has been reached by the courts of Ontario and Manitoba, Malone v. Trans-Canada Airlines, Ontario, 1 Avi. 1028, 1030; McInnery v. McDougall, 47 Manitoba 119, 1 Avi. 718; Galer v. Wings, 47 Manitoba 281, 1 Avi. 778, 782.

There are a number of decisions in which the courts have declined to apply the doctrine of res ipsa loquitur to airplane accidents: Morrison v. LeTourneau Co., 5 Cir., 138 F. 2d 339; Cohn v. United States Air Lines Transfer Corporation, D. Wyo., 47 F. Supp. 865; Herndon v. Gregory, 1935, 190 Ark. 702, 81 S. W. 2d 849, 82 S. W. 2d 244; Wilson v. Colonial Air Transport Inc., 1932, 278 Mass. 420, 180 N. E. 212, 83 A. L. R. 329; Smith v. Whitley, 223 N. C. 534, 27 S. E. 2d 442; Boulineaux v. City of Knoxville, 20 Tenn. App. 404, 99 S. W. 2d 557; Budgett v. Soo Sky Ways, 64 S. D. 243, 266 S. W. 253.

With the exception of Smith v. Whitley, *supra*, none of these cases, however, involved a common carrier. In each instance, the plane was either a private plane or was on a test flight. In Smith v. Whitley, *supra*, it did not appear whether the airplane was a common or private carrier.

The foregoing considerations inescapably lead to the conclusion that the doctrine of res ipsa loquitur should be deemed applicable to accidents involving airplanes operating as common carriers." 76 F. Supp. at 495.

[5]See Morris, "Res Ipsa Loquitur—Liability Without Fault," 25 Ins. Counsel Journal 97, quoting: "It adds nothing to the law, has no meaning which is not more clearly expressed for us in English, and brings confusion to our legal discussions. It does not represent a doctrine, is not a legal maxim, and is not a rule." Dissenting opinion of Bond, C. J., Potomac Edison Co. v. Johnson, 152 Atl. 633, 636 (Md. 1930).

explanation) in Capital Transit v. Jackson, 1945, 149 F. 2d 839, 841:

> "Some of the decisions hold that a 'presumption' arises, some a 'permissible inference,' other a 'prima facie case,' and in still others that the burden of proof is shifted to the defendant. The confusion is added to by the continued use of the words *res ipsa loquitur* to describe all of these rules without distinguishing among them. But whatever the result of the application of the rule in other jurisdictions, in the District of Columbia the rule is that, when *res ipsa* is applicable, it permits an inference of negligence and thus establishes a prima facie case, or, in other words, makes a case to be decided by a jury. But it does not shift the burden of the proof. When all the evidence is in, the question for the jury still is whether the preponderance is with the plaintiff."

This view of what *res ipsa loquitur* is, and what it does, follow the Supreme Court definition. Sweeney v. Erving, *supra*, ". . . . cut through the mass of verbiage built up around the doctrine of res ipsa loquitur." Jesionowski v. Boston & Maine RR Co., *supra* at 457. "The rule deals only with permissible inferences from unexplained events." Johnson v. United States, *supra* at 49. "When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff." Sweeney v. Erving, *supra* at 240.

In the instant case there was no jury. The trier of facts was the trial judge. Whether or not he considered the doctrine of *res ipsa loquitur* helpful and therefore applied it, we do not know, but whether he did or did not, he heard the evidence produced by each side and found the preponderance favored the defendants. We cannot say as a matter of law that had the rule been relevant and

applicable here it could by itself require or sustain a verdict for plaintiff.

The facts of an unexplained crash into the ocean may warrant an inference of negligence, but do not compel that inference.[6] Nor can we try the case *de novo*. Our duty is to see that the trial court's conclusion as to the facts was not clearly erroneous. Fed. R. Civ. P. 52(a). We are satisfied here that it was not clearly erroneous.

We do not meet the problem of whether the essential of exclusive control of the instrumentality involved was proved to the satisfaction of the trial court,[7] nor whether the airline operator can by the use of independent contractors delegate his duty of adequate maintenance of the plane. *Cf.* De Vito v. United States, Inc., E. D. N. Y., 1951, 98 F. Supp. 88.

What we have said above disposes of appellant's fourth point, that the District Court erred in various findings. We come to appellant's fifth and last claimed error, the failure of the trial court to make findings disposing of appellant's claims for loss of baggage and refund of fares paid.

Appellant urges that only one cause of action exists for *all* pecuniary loss, which includes cost of transportation paid and the value of baggage lost. Appellees urge that

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[6] *Cf.* Danner v. Atkins, 1956, 47 Cal. 2d 327, 303 P. 2d 724; Druzanick v. Criley, 1942, 19 Cal. 2d 439, 444, 122 P. 2d 53, 55.

[7] Prosser, Torts 43 (2 ed. 1955).

"Negligence may be proved by circumstantial evidence. One type of circumstantial evidence to which the courts have given the name res ipsa loquitur, arises where

(a) the accident is of a kind which ordinarily does not occur in the absence of someone's negligence, and

(b) it is caused by an instrumentality within the exclusive control of the defendant, and

(c) the possibility of contributing conduct which would make the plaintiff (patient) responsible is eliminated."

this is solely a death statute and the pecuniary loss must be sustained by the persons for whose benefit the suit is brought. Appellant cites no cases; appellees but one, denying recovery of funeral expenses (The Culberson, 3 Cir., 1932, 61 F. 2d 194). The right of plaintiff to sue here depends on statute. The statutory right is for the benefit of those named by statute—wife, husband, minor child, or dependent relative. These may or may not be the beneficiaries of decedent's estate. Any recovery of fare paid, or baggage lost, would inure only to the benefit of decedent's estate—not necessarily to those whom the statute specifies. We find no cases directly in point. Were it essential in this case, we could conclude that the personal representative, suing only under the D.H.S.A., has no cause of action for funeral expenses, fare paid, or baggage lost. But in view of the lower court's finding of no liability, which we do not disturb, the failure to find on this issue cannot be substantial or prejudicial error.

We have considered above the liability of the carrier, Transocean Air Lines, Inc. In considering the liability of Slick, we meet head on the issue touched upon above (see note 7)—"exclusive control," and the divided responsibility of Slick Airways, Inc. and Transocean for the proper maintenance of the plane. There seems little question but that on this record we could not hold as a matter of law that Slick had exclusive control over the plane so as to render *res ipsa loquitur* applicable. To consider holding Slick liable would at least require some proof that a failure to maintain the plane in proper mechanical condition was a proximate cause of the crash. This factual issue has been decided by the trial court adversely to appellant.

In considering whether the trial court was "clearly erroneous" in the conclusions to which it came upon weighing all the evidence, we must keep in mind that every

inference and intendment favors the position of appellees. We cannot re-examine or re-weigh the evidence, but this is what appellant would have us do with respect to the disputed matters of pilot training, pilot fatigue, and, most particularly, auto pilot maintenance and malfunction.

Finally, we are asked to find the manufacturer of the plane, Douglas Aircraft Corporation, Inc., liable. This position is not seriously urged by appellant. The trier of fact found no negligence existed on the part of Douglas, and we agree there was none.

The judgment is *affirmed* as to all defendants.

(Endorsed.) Opinion. Filed May 5, 1958.

As amended by order of July 14, 1958.

Paul P. O'Brien, Clerk.

Judgment.

United States Court of Appeals, for the Ninth Circuit.

Joseph M. Trihey, Administrator of the Estate of Marcia G. Muna, deceased, *et al.*, Appellants, vs. Transocean Air Lines, Inc., a corporation, *et al.*, Appellees. No. 15446.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and entered May 5, 1958.

PAUL P. O'BRIEN, Clerk.

APPENDIX B.

The proceedings at trial, ending with the Court's ruling that the doctrine of *res ipsa* did not apply, have been extracted from the Record, as follows:

(Friday, April 13, 1956)

"Mr. Blackman: . . . So I would respectfully ask the Court, if it would, to see whether or not it will give us an answer to those questions of law that are contained in the pre-trial order, at least, so that we know just how far our proof should extend at this time.

"The Court: Well, I just had in mind your proceeding at this time, Mr. Blackman—in other words, calling your witnesses. We will take care of that as we go along, and not make any decision on that right now.

"Mr. Blackman: I see.

"The Court: I will work on it some on the week end or sometime, but I have been trying this case and I thought maybe we could go ahead and I could work on it during the week end.

"Mr. Blackman: Fine, your Honor.

"Mr. Tilson: I can assure your Honor that we have no idea of conceding that res ipsa applies in this particular case, which, of course, is on the admiralty side and brought under a specific statute which was not in any manner involved in the cases cited. So that I think before we get through we will be going ahead with all of it anyway.

"The Court: We'll just proceed with the case.

"Mr. Tilson: Yes, just go ahead with the trial.

"The Court: Well, we'll do it that way. The Court has made its statement, Mr. Tilson spoke, and I take it Mr. Kearney and the rest of you go along with Mr. Tilson's statement on that?

"Mr. Kearney: Yes, your Honor, although I think, as far as Douglas Aircraft Company is concerned, the plaintiff does not claim that the doctrine of res ipsa loquitur would in any event apply. Isn't that true, Mr. Blackman?

"Mr. Blackman: I think that's a fair statement, yes.

"Mr. Boxx: On behalf of defendant Slick, we certainly strenuously contend that it does not apply to the defendant Slick.

"The Court: All right. Well, you might as well proceed then."

* * * * * * *

(Tuesday, April 17, 1956)

"Mr. Blackman: One other matter, if I may inquire of the Court whether or not the Court has come to any conclusion concerning this question of the applicability of res ipsa loquitur.

"The Court: Well, I felt that it didn't apply. Just go ahead with your case.

"Mr. Blackman: I see. Is that an indication that the Court has on the basis of the evidence that has been submitted so far?

"The Court: Oh, no. I had to make a ruling the other day when you brought that question up.

"Mr. Blackman: Yes.

"The Court: I said that if I ruled on that it would shorten the case, and I said I felt it didn't apply. So we will proceed with the trial.

"Mr. Blackman: Is the question still open for further consideration at a later date?

"The Court: Yes, certainly.

"Mr. Blackman: I see.

"The Court: I didn't ask to hear from defense counsel because I thought you wouldn't quarrel with the Court's ruling.

"Mr. Tilson: No, indeed.

"Mr. West: No quarrel, your Honor.

"Mr. Foxx: No quarrel.

"The Court: All right."